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IN THE

Supreme Court of the United States

OCTOBER TERM, 1957

No. 304

SYLVIA GOULD HOEFER,

Petitioner,

v.

LORRAINE WALCOTT J. PARKER,

Respondent.

REPLY BRIEF FOR PETITIONER ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

RICHARD H. WELS
Counsel for Petitioner
No. 551 Fifth Avenue
New York 17, N. Y.

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Respondent has filed a brief in opposition to the granting of certiorari which represents that the petition for certiorari was filed out of time, and hence must be denied.

Petitioner represents to the Court that the petition was filed within the time prescribed by the rules of the Court, and the applicable statutes. The statute (28 U.S.C. 1257) requires that the appeal be taken from a final judgment of the state court. In determining whether there is finality this Court will examine "both the judgment and the opinion as well as other circumstances which may be pertinent." *Gospel Army* v. *Los Angeles*, 331 U. S. 543, 548; *Department of Banking* v. *Pink*, 317 U. S. 264, 268; *Richfield Oil Corp.* v. *State Board*, 329 U. S. 69, 72.

Under New York practice the time for taking an appeal commences to run after service upon the attorney for the appellant of a copy of the judgment or order appealed from and a written notice of the entry thereof. Section

502 of the New York Civil Practice Act. Thus, subdivision (b) of such section provides that

> "An appeal as of right to the Court of Appeals must be taken within sixty days after service upon the attorney for the appellant of a copy of the judgment or order appealed from and a written notice of the entry thereof. The party entering the judgment or order, or serving the notice of the entry thereof, shall not, however, be entitled to notice to limit his time."

And subdivision (2) of that section provides that:

> "An application in the Appellate Division for permission to appeal to the Court of Appeals from a judgment or order of the Appellate Division, or of the court of original instance, must be returnable at the term of the Appellate Division during which a copy of the judgment or order sought to be appealed from with notice of entry thereof was served, or at the next succeeding term."

Similarly, Section 612 of the New York Civil Practice Act provides that:

> "An appeal to the Appellate Division of the Supreme Court, except as otherwise provided by statute, must be taken within thirty days after service upon the attorney for the appellant of a copy of the judgment or order appealed from and a written notice of the entry thereof except that the party entering the judgment or order, or serving the notice of entry thereof, shall not be entitled to further notice to limit his time of appeal."

Under New York practice (Section 607-a of the New York Civil Practice Act and Rule XVI of the Rules of the Court of Appeals) the judgment or order of the Court of Appeals must be remitted to the court below, and judgment is finally entered in the court below.

In the light of these provisions and the practice in the State of New York, it is significant to note precisely what occurred in this case.

The opinion of the Court of Appeals was handed down on April 12, 1957. On April 13, 1957, counsel for the petitioner received by mail from the Clerk of the Court of Appeals a document entitled "OPINION, UNREVISED AND UNCORRECTED. NOT FOR PUBLICATION." A copy of such document is attached hereto in Appendix C. A comparison of this document with the final version of the opinion of the Court of Appeals (reprinted at pp. 29-34 of Appendix B to the petition) discloses that changes and corrections were thereafter made.

Certainly no stretch of language could denominate this document a "final judgment" which is entitled to finality. Indeed, final and definitive judgments and orders of the Court of Appeals appear in a different manner, as evidenced by the order of the Court of Appeals granting leave to appeal, a copy of which is likewise attached hereto in Appendix C.

No further notice of the judgment in this case was received by counsel for the petitioner until April 29, 1957, when there was received a copy of the judgment entered on April 26, 1957, on the decision of the Court of Appeals, which is reprinted at pages 35-37 of the petition in Appendix B thereto.

Petitioner diligently sought to obtain a certified copy of the proceedings from the Clerk of the Court of Appeals for the purpose of completing the printing of and perfecting the petition and filing it with this Court. On July 3, 1957, counsel for the petitioner wrote to the Clerk of the Court of Appeals enclosing a check in payment of the Court's fee for a certified copy of the proceedings, and thereafter received a reply from the Clerk of the Court of Appeals dated July 5, 1957 (a copy of which is likewise

attached hereto in Appendix C), returning the check and referring counsel to the Clerk of New York County.

Visits to the County Clerk elicited insistence that these certificates must be obtained from the Clerk of the Court of Appeals, and it was only on July 17, 1957, that counsel was able to procure the certified copies of the proceedings in the Court of Appeals, and of the remittitur of the Court of Appeals. Indeed, this was the first time that a copy of the remittitur of the Court of Appeals was seen, and that there was any knowledge that it was dated April 12, 1957, a curious circumstance since the language of the opinions certified therein was somewhat different from the "OPINION—UNREVISED AND UNCORRECTED, NOT FOR PUBLICATION", which was sent to counsel for the petitioner on the same date.

Section 607-b of the New York Civil Practice Act requires that "Not less than two copies of the opinion, if any, filed by the Court, must be furnished without charge to each counsel appearing in the case." The only copies of any opinion furnished to counsel for the petitioner was the one copy of "OPINION UNREVISED AND UNCORRECTED, NOT FOR PUBLICATION.", which has been referred to above.

In *Commissioner of Internal Revenue* v. *Bedford*, 325 U. S. 279, the Court dealt with a similar situation and the same problem in a case coming to this Court from the Circuit Court of Appeals for the Second Circuit. In that case a document entitled "Opinion" was handed down by the Circuit Court of Appeals on August 8, 1944, and on the same day the Clerk made a docket entry entitled "Order reversed, A. N. Hand, J.". On August 29, 1944, a document entitled "Order of Mandate" was filed, and the petition for certiorari was filed on November 29, 1944. In stating the case in the opinion of the Court, Mr. Justice Frankfurter noted that "The petition was filed too late if the 'Opinion', as respondent contends, constitutes the 'judgment'. It was filed in time if the 'Order for Man-

date' may properly be deemed the 'judgment'." This is precisely the question here.'

The Court concluded that the "Opinion" was not the judgment, and held the petition to be timely. Speaking for the Court, Mr. Justice Frankfurter said:

> "Whether the announcement of an opinion and its entry in the docket amounts to a judgment for purposes of appeal or whether that must await some later formal act, ought not to be decided on nice-spun argumentation in disregard of the judicial habits of the court whose judgment is called into question, of the bar practising before it, of the clerk who embodies its procedural traditions, as well as in conflict with the assumption of the reviewing court." (pp. 287-288)

At page 286, Mr. Justice Frankfurter also said:

> "It does not detract from the 'Opinion' as an opinion that in its heading it gives as dates 'Argued January 6, 1944. Decided August 8, 1944,' and that it concludes with 'The order of the Tax Court is reversed'. The same or similar phrases are commonly employed in opinions of this Court without changing their character as opinions. Nor do like phrases in the opinions of the other circuit courts of appeals turn them into judgments, since in all other circuits, judgment orders are separately filed. In spite of its title, the 'Order for Mandate' on its face fulfills the function of such a judgment order."

Certainly no prejudice was sustained by the respondent by reason of the fact that the petition was filed on July 19, 1957, rather than on July 12, 1957. On both dates the Court was in recess, and the petition in neither event could be disposed of until the return of the Court from recess and the commencement of the October 1957 Term.

It is respectfully submitted that the petition for certiorari was timely, and should be granted.

Respectfully submitted,

RICHARD H. WELS,
Counsel for Petitioner.

ROBERT A. SALTZSTEIN,
ALAN D. MARCUS,
Of Counsel.

Appendix C

OPINION OF THE COURT OF APPEALS

See Opposite ☞

State of New York
Court of Appeals

No. 23.

Lorraine Walcott J. Parker,

Respondent,

vs.

Sylvia Gould Hoefer,

Appellant.

OPINION

UNREVISED AND UNCORRECTED. NOT FOR PUBLICATION.

DYE, J.:

In this appeal by our permission, we consider whether New York must give full faith and credit to a foreign judgment, notwithstanding that the underlying claim would not be enforceable in the state.

The plaintiff, a resident of Vermont, has a final judgment against the defendant, a resident of New York, in an action for alienation of her husband's affections and for criminal conversation. When such judgment could not be collected in Vermont she commenced this action to enforce it in New York. The defendant, by her answer, interposed a defense based upon all the provisions of Civil Practice Act, art. 2-a, relating to actions against the public policy of the State of New York which, among others, includes actions "based upon alleged alienation of affections and criminal conversation" (§ 61-a). When issue was joined, plaintiff moved, pursuant to Rules of Civil Practice, Rule 109, to strike the answer and for judgment pursuant to Rules of Civil Practice, Rule 112[1].

Civil Practice Act, art. 2-a, designates various causes of action which may not be enforced in New York (cf. § 61-a to f inclusive)[2] but nowhere does it abolish an action on a judgment rendered in a sister state by a court having jurisdiction of the person and the subject matter.

We do not read the statutory language as used in section 61-d or similar language in relation to enforcement or recovery upon contracts made in respect to claims buttressed in the abolished subject matter (§ 61-f) as including a foreign judgment. We note that when the statute refers to acts done, it speaks only of acts "done within the state". The Legislature could have easily said "acts done within or without this state" had it so intended. While it is true that the statute is to be liberally construed (§ 61-h), it does not mean that the court may read into the statute by implication something that is not mentioned. Statutes in derogation of common law may not be enlarged beyond the clear import of the language used (Leppard v. O'Brien, 225 App. Div. 162 affd 252 N.Y. 563, Matter of Fischer, 261 App. Div. 252) and the presumption attaches "unless the language is clear and explicit in that direction" (People v. Phyfe, 136 N.Y. 554). There is no substance in the argument that the defendant by her answer placed herself within the reach of section 61-d and f. True, the answer says that "many of the acts alleged therein were alleged to have occurred in the State of New York". Such language is meaningless in face of the circumstance that the plaintiff has neither alleged nor defendant admitted, that the Vermont judgment is based on transactions which occurred within New York State, nor is there anything in the record indicating that any of the acts actually took place in New York.

Had the legislature attempted to abolish actions for enforcement of judgments rendered by courts of competent jurisdiction in sister states, it would have incurred the risk of unconstitutionality (U.S. Const. Art. IV, § 1). The Supreme Court of the

Milwaukee County v White Co 296 U S 268)

Because there is a full faith and credit clause defendant may not a second time challenge the validity of plaintiff s right which has ripened into a judgment (Magnolia Petroleum Co v Hunt, 320 U S 430) which is to say that a judgment of a court having jurisdiction of the parties and of the subject matter operates as res judicata in the absence of fraud or collusion even if obtained upon default (Riehle v Margolies, 279 U S 218, 225) "Such a judgment obtained in a sister state is with exceptions not relevant here (cf. Williams v North Carolina, 317 U S 287), entitled to full faith and credit in another state thereof although the underlying claim would not be enforceable in the state of the forum" (Morris v Jones, supra, Christmas v Russell 5 Wall 290, Fauntleroy v Lum supra, Roche v McDonald supra, Titus v Wallick 306 U S 282)

It is argued that this is the sort of case where it can be said that the full faith and credit clause is not "inexorable or unqualified demand" (citing Pink v A A A Highway Express (314 U S 201) That case is not apt in the setting There the New York Superintendent of Insurance as statutory liquidator of an insolvent Mutual Insurance Company organized in New York, sought to recover assessments levied against policy holders resident in Georgia allegedly due by reason of their mutual membership The action was dismissed on demurrer and the Supreme Court affirmed on the ground that the full faith and credit clause could not be used to override the domestic law and policy of Georgia against the enforcement of obligations extrinsically imposed by New York law a situation quite different from the present situation Here

not be called a suit on an action abolished in New York (cf. Fauntleroy v. Lum supra; Hellstern v. Hellstern, 279 N.Y. 327; Williamsburgh Savings Bank v. Bernstein, 277 N.Y. 11). When so viewed, it does not contravene New York policy as enunciated in Article 2-a, Civil Practice Act. The answer raises no issues of fact requiring a trial, for the defenses relied on are insufficient as matter of law.

The judgment appealed from is affirmed with costs.

Appendix C.

ORDER OF THE COURT OF APPEALS

See Opposite ☞

State of New York,

IN COURT OF APPEALS

At a Court of Appeals for the State of New York, held at Court of Appeals Hall in the City of Albany on the fifteenth *day of* November *A. D. 1956.*

Present, HON. ALBERT CONWAY, *Chief Judge, presiding.*

Mo. No. 459

Lorraine Walcott J. Parker,
Respondent,

vs.

Sylvia Gould Hoefer,
Appellant.

A motion for leave to appeal to the Court of Appeals in the above cause having been heretofore made upon the part of the appellant herein and papers having been duly submitted thereon, and due deliberation thereupon had

ORDERED, that the said motion be and the same hereby is granted.

A Copy

Eugene Kimball
Deputy Clerk

DYE, J.:

In this appeal by our permission, we consider whether New York must give full faith and credit to a foreign judgment, notwithstanding that the underlying claim would not be enforceable in the state.

The plaintiff, a resident of Vermont, has a final judgment against the defendant, a resident of New York, in an action for alienation of her husband's affections and for criminal conversation. When such judgment could not be collected in Vermont she commenced this action to enforce it in New York. The defendant, by her answer, interposed a defense based upon all the provisions of Civil Practice Act, art. 2-a, relating to actions against the public policy of the State of New York which, among others, includes actions "based upon alleged alienation of affections and criminal conversation" (§ 61-a). When issue was joined, plaintiff moved, pursuant to Rules of Civil Practice, Rule 109, to strike the answer and for judgment pursuant to Rules of Civil Practice, Rule 112[1].

Civil Practice Act, art. 2-a, designates various causes of action which may not be enforced in New York (cf. § 61-a to f inclusive)[2] but nowhere does it abolish an action on a judgment rendered in a sister state by a court having jurisdiction of the person and the subject matter.

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1. The case first came to our Court on a direct appeal from Special Term, which we dismissed (308 N.Y. 746). Appellant then went to the Appellate Division, First Department, and they affirmed (1 App. Div. 2d 659), from which affirmance an appeal was taken as of right on an alleged constitutional question which we dismissed (1 N.Y. 2d 873). The App. Div. thereafter denied leave to appeal to this Court and when the motion was renewed in this Court we granted (2 N.Y. 2d 707).

2. The actions abolished are those grounded on "alienation of affections, criminal conversation, seduction and breach of contract to marry".

(24)

presumption attaches "unless the language is clear and explicit in that direction" (People v. Phyfe, 136 N Y 554) There is no substance in the argument that the defendant, by her answer, placed herself within the reach of section 61-d and f. True the answer says that "many of the acts alleged therein were alleged to have occurred in the State of New York". Such language is meaningless in face of the circumstance that the plaintiff has neither alleged nor defendant admitted, that the Vermont judgment is based upon transactions which occurred within New York State, nor is there anything in the record indicating that any of the acts actually took place in New York.

Had the legislature attempted to abolish actions for enforcement of judgments rendered by courts of competent jurisdiction in sister states, it would have incurred the

risk of unconstitutionality (U.S. Const. Art. IV, § 1) The Supreme Court of the United States has from the beginning consistently seen to it that "A judgment of a state court should have the same credit, validity and effect in every other court in the United States which it had in the state where it was pronounced" (Hampton v. M'Connell, 3 Wh. 234) which principle is recognized in the Federal Statutes (R.S. §905, 28 U.S.C. §687) and has been reiterated in Fauntleroy v. Lum (210 U.S. 230, 237); Morris v. Jones, (329 U.S. 545) and followed in numerous cases (cf. Sherrer v. Sherrer, 334 U.S. 343;

3/ Art IV. Section 1. Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof."

faith and credit clause is not "inexorable or unqualified demand" (citing Pink v. A A A Highway Express (314 U S 201). That case is not apt in the setting. There the New York Superintendent of Insurance, as statutory liquidator of an insolvent Mutual Insurance Company organized in New York, sought to recover assessments levied against policy holders resident in Georgia allegedly due by reason of their mutual membership. The action was dismissed on demurrer and the Supreme Court affirmed on the ground that the full faith and credit clause could not be used to override the domestic law and policy of Georgia against the enforcement of obligations extrinsically imposed by New York Law, a situation quite different from the present situation. Here the plaintiff is not attempting to enforce in the courts of New York an action for alienation of affections and criminal conversation, which have been abolished in New York, but rather, to enforce a judgment rendered in Vermont as between these parties which was final and conclusive on the rights litigated. New York cannot retry the case or review as on appeal the Vermont judgment. The tort on which the Vermont action was based was fully merged in the judgment. The judgment became a debt which the defendant was under obligation to pay (Gutta Percha & Rubber Manufacturing Co. v. The Mayor, 108 N.Y. 276). The present suit, then, is upon an entirely different cause of action from that merged in the judgment (Titus v. Wallick, supra) and may

[illegible]

[illegible]

Plaintiff-Respondent,

vs.

SYLVIA GOULD HERBERT,

Defendant-Appellant.

(Copy)

ORDER WITH
NOTICE OF SETTLE.

MOSS & WELS

Attorneys for Defendant-Appellant.

551 FIFTH AVENUE
Borough of Manhattan
New York 17, N. Y.

To

Attorney for

Appendix C

LETTER FROM CLERK OF COURT OF APPEALS

See Opposite ☞

State of New York
Court of Appeals

Raymond J. Cannon
Clerk

Clerk's Office
Albany 7

July 5, 1957

Sess & Wels, Esqs.
Counsellors at Law
551 Fifth Avenue
New York 17, N. Y.

Re: Parker v. Hoeler, Cal. No. ...

Dear Sirs:

We have your letter dated July ..., 1957, relative to the above cause.

The record in question is certified by the Clerk of New York County. The said record is returned herewith.

We have voided your check and also return it herewith.

Very truly yours,

Raymond J. Cannon

Clerk